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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment to the Commission's	)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing	)	
The Costs of Microwave Relocation	)	

To: The Commission

REPLY COMMENTS OF AMERICAN PETROLEUM INSTITUTE

THE AMERICAN PETROLEUM INSTITUTE

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SUMMARY

API commends the Commission for committing to adhere to its rules concerning the voluntary negotiation process and the ability of microwave incumbents and PCS licensees to negotiate for incentive payments in exchange for early relocation or incumbents foregoing Commission-mandated rights. API is concerned, however, that several proposals which the Commission has labeled as "clarifications" of existing rules are, in effect, major rule changes that would have a dramatic and detrimental impact on the ability of microwave incumbents to receive fair compensation for their facilities or to even be compensated at all.

Specifically, API urges the Commission to recognize that all parties must be open to compromise in any successful negotiation process. By forcing incumbents to accept any offer labelled "comparable facilities" which is submitted by a PCS licensee during the involuntary negotiation period, regardless of the sufficiency of that offer, the Commission's proposal would impose mandatory relocation, not mandatory negotiation.

API submits that where no additional costs are imposed on PCS licensees, any incumbent modification should be

permitted -- including station relocations of greater than two seconds, or even frequency changes that might be dictated by the interference analysis occasioned by a station relocation. API opposes the Commission's plan to impose a time limit on a PCS licensee's obligation to provide comparable facilities. Not only will its adoption serve as a disincentive for PCS licensees to relocate microwave incumbents in subsequent years, it totally ignores the legitimate life of microwave equipment now being operated in rural areas that may ultimately be forced from service with no compensation.

API emphasizes that PCS licensees should not be permitted to pay anything less than the true costs of relocating microwave incumbents. Where costs would not have been incurred by the microwave incumbent but-for the existence of the PCS licensee, those costs should be fully recoverable by the microwave incumbent, including attorney's fees, nondepreciated equipment values, and modern technology.

API supports the Commission's proposal for cost-sharing among PCS licensees because it will encourage systemwide relocations of microwave incumbents. API believes that the Commission should apply this cost-sharing proposal to

microwave incumbents that choose to relocate portions of multilink systems where no PCS relocation offer is pending. In this way, an incumbent would retain interference rights to these links until a PCS licensee wishes to commence operations which would have interfered with that link. At that point, an incumbent could be reimbursed for the reasonable amount of the relocation, subject to an appropriate cap.

BEFORE THE

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Amendment to the Commission's Rules Regarding a Plan for Sharing The Costs of Microwave Relocation	)	**WT Docket No. 95-157**

To: The Commission

REPLY COMMENTS
OF THE
AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits these Reply Comments regarding Comments filed by other participants that responded to the Notice of Proposed Rule Making ("Notice") adopted by the Commission on October 12, 1995[1/] concerning the Petition for Rule Making filed by Pacific Bell Mobile Services ("PacBell").

[1/] 60 Fed. Reg. 55529 (November 1, 1995).

I. REPLY COMMENTS

A. Voluntary Negotiations Must Remain Truly Voluntary

1. In its Notice, the Commission confirmed that, during the voluntary negotiation period, microwave incumbents are not required to meet or to negotiate with PCS licensees. Instead, the negotiations during this initial phase are strictly voluntary. In addition, Commission rules established that, for non-public safety entities, the voluntary period expires April 4, 1997; for public safety incumbents, the voluntary period expires April 4, 1998. Therefore, the obligation to negotiate in good faith is only invoked during the involuntary negotiation period. See, e.g., ITA at 4-5.

2. In reiterating its support for the voluntary negotiation period, the Commission correctly stated that the rules enable a PCS licensee to offer "premium payments or superior facilities as an incentive to the incumbent to relocate quickly." Notice at ¶ 6. The Commission is wise to permit the marketplace to determine the proper conditions for microwave relocation during the voluntary period. It would be difficult to imagine the great extent of micromanagement needed if the Commission determined

otherwise and attempted to dictate the terms of relocation of the thousands of unique incumbent systems which currently operate in the 2 GHz band.

3. Yet such micromanagement is exactly what the PCS interests urge the Commission to undertake. For example, Sprint Telecommunications Venture (STV) requests that the FCC establish a three year period governed not by market forces but by the Commission's judgment of what constitutes a "good faith" offer of comparable facilities. Sprint at 17. Similarly, CTIA proposes that the Commission require parties to negotiate during the voluntary period and define good faith as the "absence of malice". CTIA at 9. API cannot imagine a more contentious and prolonged undertaking than for the Commission (or any other forum) to open the floodgates of accusations concerning the intent of negotiators and whether offers are made in "good faith" or "bad faith". It would be an enormous waste of time and resources for the Commission to wade through the mire of negotiation details in an attempt to examine every aspect of every proposal for evidence of "bad faith" intent.

4. Likewise, PCS licensees seek to force incumbents to negotiate during the voluntary negotiation process or else receive the imprimatur of "bad faith" and be stripped

of their rights entirely or forced to accept the PCS licensee's minimal offer of reimbursement. For example, PacBell asserts that the Commission should impose a "good faith" presumption upon offers of comparable facilities during the voluntary period; if a microwave incumbent does not accept, then, in the mandatory period, that incumbent should immediately be converted to involuntary relocation and declared to be in secondary status without any compensation. PacBell at 9-10. PCS licensees are replacing microwave systems built and operated by incumbents at their own expense for the public's safety as well as their own important business uses. Rather than deprive microwave incumbents of the ability to freely negotiate replacement of these valuable facilities, the Commission should continue to stand firm in its intention to permit the voluntary negotiation period to be driven by the give-and-take of negotiations and to remain truly voluntary. See, e.g., APCO at 4, 6; American Public Power Association (APPA) at 3; East River Electric Power Cooperative at 3; ITA at 4; L.A. County at 3.

B. All Reasonable Costs of Relocation Should Be Borne by the PCS Licensees

5. The Commission's rules are plain and simple, and have been so since before PCS licensees pledged a dime to the U.S. Treasury: PCS licensees are required to pay all costs which are reasonable and necessary to relocate a microwave incumbent. The Commission should maintain this policy in all respects. As noted by Infocore Wireless, Inc., a C Block auction aspirant, the burden of incurring microwave relocation costs has always been an inherent part of the PCS proceeding. Infocore at 2. This burden was well-known by the A and B Block auction participants in advance of the auction, and this cost serves as a partial offset to the advantage afforded to such PCS licensees by the early receipt of their licenses vis-a-vis subsequent PCS licensees. Infocore at 2-3.

6. The Commission should publicly chastise these few large PCS licensees for their repeated attempts to reduce their own costs of relocation at the expense of microwave incumbents. API reminds the Commission that microwave incumbents are already sacrificing a great deal for PCS licensees. For example, microwave incumbents are incurring significant internal costs to respond to the demands of the

FCC's complex relocation process and to prepare for wholesale disruption of their telecommunications systems. Yet, microwave incumbents are not clamoring to the Commission, demanding that PCS licensees reimburse these internal costs, even though these costs are significant and are solely the result of the desire of PCS licensees for the spectrum occupied by microwave incumbents.

7. API joins in the chorus of opposition to the Commission's tentative proposal to exclude certain costs from reimbursement. See, e.g., APCO at 8; Central Iowa Power Cooperative at 1; Valero at 3-4. For example, reasonable attorney's and consultant's fees should be fully reimbursable. As numerous entities observed in their comments, PCS licensees have fielded an army of internal and external lawyers and consultants. See, e.g., APCO at 8; UTC at 25; Southern California Gas Company at 7. In light of the fact that such advisors are necessary expenses for PCS licensees, they should not be labelled as "extraneous" expenses for microwave incumbents. AAR at 7; APCO at 8; Cox and Smith, Incorporated at 2; East River Electric Power Cooperative at 2; L.A. County at 6; Valero at 3-4. Instead, the Commission should apply a "but for" test to determine all reimbursable costs: "but for" the PCS licensee, if the microwave incumbent would not have incurred the cost, it

should be reimbursed, provided it is reasonable and documented.

C. The Commission Should Not Penalize Microwave Incumbents for Circumstances Beyond Their Control

8. The microwave incumbents built their systems over many years using state-of-the-art technology to provide vital communications to support this nation's infrastructure industries, as well as state and local governments. These tasks include provision of oil and natural gas to fuel our cars and heat our homes, electricity to run our factories and light our lives, safety services to treat our sick and rescue those in danger, and rail service to take us safely to places and deliver food and other goods to our stores. Now, these microwave incumbents are being forced to change their operations in order to accommodate PCS corporations. The Commission should continue to ensure that microwave incumbents become partners and not victims of the Commission's *Emerging Technology* proceeding.

(1) Depreciated value

9. Through no fault of their own, microwave incumbents find themselves forced to transition to new

facilities at a time when their own facilities are comparatively older, often analog-based systems that, nonetheless, have extremely high rates of reliability and are crucial for incumbents' daily operations. The Commission has previously assured incumbents that depreciation and amortization of existing equipment will not be considered. See, Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589, at ¶ 16, n.18; see also, UTC at 26.

10. Despite this clear policy, the Commission tentatively suggested in its Notice permitting PCS corporations to strip incumbents of their operational systems and provide them with only depreciated values in return. The significant level of opposition to this proposal from microwave incumbents participating in this proceeding evidences the fact that such minimal payments would not permit incumbents to be made whole again. AUE at 7; Central Iowa Power Cooperative at 2; East River Electric Power Cooperative at 2; NRECA at 6; Southern California Gas Company at 16; Valero at 4; Western Wireless Corporation at 15. API reiterates its opposition to this proposal since it would unfairly change the framework of relocation at this late date and, more importantly, would force incumbents to

move from operating systems without providing them sufficient funds to replace those systems.[2/]

(2) Analog versus digital replacement equipment

11. Again, incumbents were efficiently operating their existing systems until the PCS proponents came along. Now that these incumbents are forced to move through no fault of their own, they should be provided with up-to-date technology, rather than outdated technology. The Commission specifically stated in its final transition rules that incumbents will not bear the cost of equipment relocation, "and in fact will benefit to the degree that aging equipment using older technology may be replaced with new equipment using state-of-the-art technology." See, Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589, at ¶ 16; see also, UTC at 25-26.

12. API simply requests the Commission to adhere to its existing policy. Not only is digital equipment what most microwave incumbents would purchase on the open market

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[2/] API particularly opposes the mean-spirited proposal of PacBell to punish those who do not conclude agreements during the voluntary period by providing them only with depreciated value. PacBell at 8.

if left to their own devices, it is less expensive in the long run than analog equipment. As Alexander Utility Engineering, Inc. (AUE) demonstrates, digital systems' operational and contract maintenance support costs are significantly less than those for analog systems, and the long term costs of digital systems are less than the long term costs of analog systems. AUE at 4-5. In addition, numerous parties pointed out in their comments that analog equipment is being phased out of production by some manufacturers and will become increasingly unavailable and/or more expensive to obtain, operate and repair. AAR at 6; APCO at 6; BellSouth at 13; Central Iowa Power Cooperative at 2; East River Electric Power Cooperative at 2; Interstate Natural Gas Association of America at 2; L.A. County at 5; Tenneco at 11; UTC at 25.

(3) System component trade-offs

13. The Commission's "trade-off" proposal is dangerous because it ignores the essential needs of each incumbent's system as previously determined by that incumbent through the acquisition of its equipment. Notice at ¶ 75. PCS licensees should not be permitted to cut corners on reliability, throughput, operating cost or serviceability and make up for it in other areas. API

agrees with the many incumbents that stated in their comments that trade-offs between system parameters should be purely at the discretion of the incumbent; otherwise, it is unreasonable to permit PCS entities to substitute their judgment for that of incumbents concerning what is important or even essential for an incumbent's operational requirements. See, e.g., UTC at 23; AAR at 6; Kansas at 1.

(4) April 5, 2005

14. Through absolutely no fault of their own, many microwave incumbents will find themselves operating in the 2 GHz band in the year 2005 simply because no PCS licensee has furnished them with a relocation offer. Microwave incumbents have no legal ability to force PCS providers to relocate them. Rather, it is the PCS providers which have the exclusive right to determine whether and when to relocate microwave incumbents.

15. As many incumbents noted in their comments, PCS build-out will not likely reach rural areas of the country by 2005. APCO at 12; UTC at 30; Valero at 5; Southern California Gas Company at 12. Furthermore, the Commission's proposal to relegate all licensees on April 5, 2005 to secondary status would provide a strong incentive

for PCS licensees to wait until after that magic date rather than incur relocation costs.

16. The existing rules enable microwave incumbents to remain co-primary indefinitely. The Commission's proposal to make such a fundamental policy change would constitute a betrayal of the agency's commitment to provide incumbents with relocation to comparable facilities at the expense of PCS entities.[3/] Moreover, the Commission's proposal is unnecessary, as many commenters pointed out, since PCS licensees will not need these frequencies at that time. American Gas Association at 5; APCO at 12; APPA at 6; East River Electric Power Cooperative at 2; NRECA at 6; Southern California Gas Company at 12; Southern Company at 12; UTC at 31; Valero at 5. Should the Commission nevertheless adopt this policy change, API agrees with suggestions made by various commenters that incumbents should maintain their primary status and PCS licensees that do not relocate microwave incumbents by April 4, 2005 should forever forfeit their right to relocate those incumbents. Southern California Gas Company at 13.

[3/] API strongly opposes PacBell's proposal that the Commission only accept renewals for primary status up until April 4, 1996. PacBell at 12.

(5) Modifications of existing systems

17. Like a deer caught in the headlights, existing microwave incumbents find themselves operating in a suddenly hostile environment. Incumbents constructed their systems and commenced operations prior to the Commission's May 14, 1992 Public Notice concerning primary status for certain modifications. In those instances where no additional cost is added to PCS licensee's expense, API respectfully submits that any modification should be permitted on a primary basis. See, e.g., Valero at 5.

18. The Commission should recognize that incumbents operate in the real world, where numerous events occur which necessitate modifications to their systems. Modifications should be permitted to receive primary status and the burden of demonstrating additional costs of a modification should rest solely with the PCS licensee. After all, the PCS licensee is the only entity familiar with its proposed operations and how incumbent microwave operations may cause increased costs. See, e.g., Southern at 13.

D. Comparable Facilities

19. API reiterates its support for the Commission's definition of a comparable facility as a system that is equal to or superior to the fixed microwave facility being replaced. NPRM at ¶ 72. However, API requests the Commission to closely consider the ramifications of its proposal that, during the mandatory negotiation period, good faith negotiations would be evidenced by acceptance of any offer for "comparable facilities" and bad faith negotiations would constitute rejection of such an offer. API agrees with the many entities that filed comments emphasizing that "good faith" negotiations should not mean accepting any offer put forth by PCS interests. AAR at 14; APPA at 3; L.A. County at 3; UTC at 18. API agrees with AAR and others that this proposal, if adopted, would convert arms-length negotiations into a contract of adhesion whereby some of the largest and most powerful companies in the world could dictate the terms of the accord. AAR at 14; APCO at 6.

20. A PCS licensee's offer of comparable facilities could appear to be sufficient from its standpoint, and yet be wholly inadequate from the standpoint of a microwave incumbent for a host of valid reasons. For example, many microwave incumbents are required to comply with Department

of Transportation and/or Nuclear Regulatory Agency mandates concerning their systems. Under the Commission's proposal, however, rejection of any offer labelled "comparable facilities" during the mandatory negotiation period is, *ipso facto*, evidence of bad faith. Where justifiable differences arise, API strongly believes that incumbents should be free to produce a counterproposal and to explain their differences. Likewise, API believes in fair negotiations: rejection of an incumbent's proposal for comparable facilities should not suggest that a PCS licensee is negotiating in bad faith with the microwave incumbent.[4/] Thus, API agrees with UTC and others that, if such a presumption were imposed, it should cut both ways: the failure of a PCS licensee to accept an incumbent's offer of what it considers to be comparable facilities should create a rebuttable presumption of bad faith on the part of the PCS licensee. See, e.g., UTC at 18-19.

21. API concurs with Valero's comments that the communications throughput component of the Commission's

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[4/] API envisions the curious results of the Commission's proposal if it were adopted: on the first day of the mandatory negotiation process, both parties send their comparable facilities "offers" to the other side, forcing both parties to accept the other party's offer. At the end of the day, each party has accepted the other party's offer, both have negotiated in "good faith" and, unless the two offers were identical, nothing has been determined.

comparability definition should be clarified to include the total capacity of an incumbent's microwave system since most incumbents have some spare capacity for future expansion and growth of their system and alternate routing capability. Valero at 4. In addition to the three elements set forth by the Commission as factors for comparability, a fourth element should be included in the definition of comparable facilities: the proposed replacement system must also have like "serviceability." When the proposed system malfunctions, access to those elements essential to restoration of service must be equal to or greater than that applicable to the incumbent system.

22. API opposes suggestions made by PacBell and other PCS interests that seek to shorten the operating cost component of comparability from 10 years to 5 years. PacBell at 7-8. Instead, operating costs in the Commission's definition of comparable facilities must be based upon the entire life of the replacement system. As TIA points out, low cost digital radios tend to involve higher operating costs than higher priced digital radios over time. TIA at 8. Analog equipment and inexpensive digital equipment will increase operating expenses for the incumbent over time. API agrees with TIA's recommendation that the

Commission establish a 10-year time frame to evaluate annual operating costs for proposed replacement systems.

E. The Cost-Sharing Plan Should be Expanded to Include Microwave Incumbents

23. The proposed cost-sharing plan is advantageous to both PCS interests and microwave incumbents because it promotes systemwide relocation of microwave incumbents. More could be done, however, to promote these efficient relocations, particularly where large systems are involved which traverse multiple licensing areas and frequency blocks. In order to truly encourage systemwide relocations, microwave incumbents must possess cost-sharing rights.

24. In instances when their deployment schedules do not require relocation until a later time, PCS licensees are declining to join in negotiations between other PCS licensees and microwave incumbents. In addition, many PCS licensees have not yet been selected at auction. Nevertheless, systemwide relocations are beneficial for incumbents and PCS interests alike. However, problems with timing can be expected to interfere with systemwide relocations. For example, an incumbent might wish to relocate all six links of its six-link system now, but the

incumbent may only be offered immediate compensation from one eligible PCS licensee for a portion of its links. The other links lie in the license areas of other PCS licensees. In order to maintain systemwide integrity, the incumbent will then be forced to choose between relocating the remaining links at its own expense or refusing to relocate any of the six links until a complete solution is offered.

25. If the microwave incumbent chooses to pay for the relocation of its stranded links, the Commission's rules currently do not permit the incumbent to receive compensation for that worthy deed from subsequent PCS licensees who benefit from the early relocation. On the other hand, if the microwave incumbent chooses to wait until a complete, systemwide relocation offer is presented by PCS licensees, then PCS rollout is delayed and the incumbent languishes in a state of uncertainty.

26. To rectify this wrinkle in the relocation process, the Commission should adopt a cost-sharing plan that permits long-term retention of interference rights for microwave links which are "self-relocated" by an incumbent. Incumbents would then be encouraged to relocate their entire system even when presented with offers for only portions of their system. Subsequently, when a PCS licensee seeks to

commence operations which would have interfered with that self-relocated link, that PCS licensee would reimburse the microwave incumbent for the reasonable cost of the early relocation. Like the PCS-to-PCS cost-sharing plan, the amount of reimbursement should be subject to any applicable reimbursement cap.

II. CONCLUSION

27. Voluntary negotiations are ongoing, the C Block auction is in progress, and the A and B Block licensees are in the process of testing their capabilities and ordering their equipment. At this late date, the Commission should refuse to re-examine the basic rules concerning the rights and obligations of PCS licensees vis-a-vis microwave incumbents. Many API members are at advanced stages of negotiations with PCS licensees, and it seems reasonable to believe that the same is true in other industries and with respect to state and local governments. Accordingly, any fundamental changes in the Commission's rule could cause major disruption to those negotiations into which a considerable amount of time and other resources have already been committed. In view of these considerations, the Commission should limit this proceeding to its sole *raison d'etre*: adoption of a workable cost-sharing plan. In order

to achieve the cost-sharing plan's goal of early rollout of PCS and systemwide relocation of incumbents, the cost-sharing plan should apply to microwave incumbents that self-relocate links.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Reply Comments and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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